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January 24, 2011

VIA ELECTRONIC FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W., Room 1034
Washington, DC 20423-0001

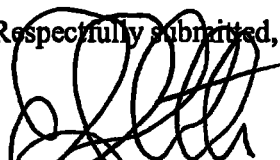
Re: **Finance Docket No. 35110**
Florida Department of Transportation -- Acquisition
Exemption -- Certain Assets of CSX Transportation, Inc.

Dear Ms. Brown:

Attached for filing in the above-captioned proceeding is the Reply of Florida Department of Transportation to Petition to Reopen of Brotherhood of Railroad Signalmen, dated January 24, 2011.

If you have any questions regarding this filing, please feel free to contact me. Thank you for your assistance on this matter.

Respectfully submitted,



Thomas J. Litwiler
Attorney for Florida Department of Transportation

TJL:tl

Attachment

cc: Richard S. Edelman, Esq.

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35110

FLORIDA DEPARTMENT OF TRANSPORTATION
-- ACQUISITION EXEMPTION --
CERTAIN ASSETS OF CSX TRANSPORTATION, INC.

**REPLY OF FLORIDA DEPARTMENT OF TRANSPORTATION TO
PETITION TO REOPEN OF BROTHERHOOD OF RAILROAD SIGNALMEN**

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**ATTORNEYS FOR FLORIDA
DEPARTMENT OF TRANSPORTATION**

Dated: January 24, 2011

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35110

FLORIDA DEPARTMENT OF TRANSPORTATION
-- ACQUISITION EXEMPTION --
CERTAIN ASSETS OF CSX TRANSPORTATION, INC.

**REPLY OF FLORIDA DEPARTMENT OF TRANSPORTATION TO
PETITION TO REOPEN OF BROTHERHOOD OF RAILROAD SIGNALMEN**

Florida Department of Transportation ("FDOT") hereby replies to the petition of the Brotherhood of Railroad Signalmen ("BRS") seeking reopening of the Board's decision served December 15, 2010 in this docket. In that decision, the Board dismissed FDOT's notice of exemption to acquire the physical assets of a CSX Transportation, Inc. ("CSXT") line extending through Orlando, Florida (the "Orlando Line"), finding pursuant to Maine DOT – Acq. Exempt. – Maine Central R. Co., 8 I.C.C.2d 835 (1991) ("Maine DOT") and its progeny that the proposed transaction would not result in FDOT becoming a rail common carrier and did not require Board authorization under 49 U.S.C. § 10901. FDOT is acquiring the Orlando Line for the purpose of establishing a commuter rail service known as "SunRail."

To accommodate the interests of the eight (8) BRS-represented CSXT signalmen who currently perform signal maintenance work on the Orlando Line, FDOT committed that such signal work would be removed from the current SunRail design-build-maintain contract and bid only to contractors that were "rail employers" under applicable federal law, such that the affected signalmen would be afforded "the federal protections they seek in the SunRail corridor." See December 8, 2009 letter from Stephanie C. Kopelousos, FDOT Secretary, to the Hon. Jeff Atwater, Florida Senate President, attached hereto as Exhibit 1. FDOT and BRS disagree as to

whether that commitment extends beyond signal maintenance work to encompass one-time signal construction work that will be performed in connection with SunRail-related upgrades to the Orlando Line. BRS's petition is predicated entirely on the notion that such disagreement is "new evidence" and a "substantially changed circumstance" warranting reopening. BRS Petition at 1, 5-6. But that notion is wrong.

In its initial substantive filing in this matter, BRS discussed the situation with respect to signal maintenance work and signal construction work on the Orlando Line as it related to FDOT's commitment:

Coincident with the passage of the Florida enabling legislation [for SunRail], FDOT wrote to the President of the Florida Senate stating that the signal work on the line would be done by Railroad Signalmen. While FDOT has subsequently talked about assigning signal maintenance work to Railroad Signalmen, FDOT has not followed-through with its commitment to date, and FDOT has said nothing about the performance of signal construction work by railroad workers.

BRS Opposition to Motion to Dismiss Notice of Exemption, April 29, 2010 ("BRS Opposition"), at 6 n.3. In the same pleading, BRS's supporting witness explicitly questioned whether the December 8, 2009 FDOT letter encompassed signal construction work:

At the time the Florida legislature passed enabling legislation for this transaction FDOT wrote to the President of the Florida Senate stating that it would work on a method for Signal work on the line to be done by Railroad Signalmen. Assuming that FDOT follows-through with that commitment, the railroad signal maintainers on the line will not be replaced, and the maintainer work would be done by railroad Signalmen. . . . [E]ven if the maintenance work is assigned to Signalmen, that still leaves the question of who will do the construction and upgrade work, which will involve a substantial number of jobs. Will that Signal work be done by Signalmen, or persons other than Signalmen? Although we have met with FDOT regarding performance of the Signal work for the line, we have heard nothing from them about that and FDOT had previously strongly resisted use of Railroad Signalmen for the Signal construction and upgrade work.

BRS Opposition, Declaration of R.G. Demott, ¶ 16.

In reply, FDOT was clear that it did not consider signal construction work as falling within the scope of the commitments in the December 8, 2009 letter:

As BRS notes, FDOT and BRS are in discussions regarding the implementation of the December 8, 2009 letter (BRS Comments at 6 n.3), and FDOT is committed to pursuing those discussions to conclusion. As BRS also indicates, BRS is now seeking commitments *beyond* the eight existing CSXT signalmen on the Orlando Line to encompass anyone else performing signal upgrade construction work on the line -- upgrades that would not be undertaken (and employment that would not be available) but for the SunRail project. BRS Comments at 5 and 6 n.3. BRS's concerns have thus migrated away from the protection of its existing signalmen on the Orlando Line to the protection of BRS's own organizational interests in other contract employees who may work on the SunRail project.

FDOT Reply to Comments of National Railroad Passenger Corporation and BRS, May 17, 2010, at 20-21 (emphasis in original). In a subsequent "reply to a reply," BRS complained again that FDOT had failed to accommodate BRS's interests in SunRail-related signal construction work on the Orlando Line:

Also, by focusing only on Signal Maintainers, FDOT has ignored the substantial volume of Signal construction work to be performed in improving and upgrading the [Orlando] line.

...

BRS certainly has a legitimate interest in the collective bargaining status and representation rights of the workers who will do the Signal upgrade work on the [Orlando] line, especially given Florida's explicit plan to assign such work to non-rail, non-union entities.

...

While FDOT appears to believe that its letter to the state legislators took care of all of BRS' concerns, FDOT has done nothing yet to implement the written commitment that it made regarding the signal services work. It is also important to note BRS' interests in this transaction, and the interests of its members, including those currently working on the [Orlando] line, go far beyond the

"concerns of the eight (8) signalmen" for their current positions, these signalmen and the BRS were and are concerned about all of the signal work and/or signal services for the [Orlando] line and other lines in Florida. Consequently, FDOT ignores the legitimate interests of the Signalmen in the signal construction and upgrade work on the [Orlando] line, and application of the Federal railroad laws to that railroad work as well as protection of standard rates of pay rules and working conditions for railroad workers.

BRS Motion for Leave to Supplement the Record, June 2, 2010, Second Declaration of R.G.

Demott, ¶¶ 7, 9, 15.

In its final statement on the subject, FDOT asserted that "BRS's private representational interest in signal construction work associated with an intrastate commuter rail project has nothing to do with the rail freight adequacy considerations that inform the jurisdictional inquiry under Maine DOT." FDOT June 11, 2010 letter at 1.

This was the evidentiary record before the Board when it issued its December 15th decision. It is difficult to imagine how this record could be construed as an FDOT representation to the Board that signal construction work on the Orlando Line would be performed only by "rail carrier" contractors. Yet that is exactly BRS's claim: according to BRS, FDOT's belief that the December 8, 2009 letter does not encompass signal construction work is a newfound position that arose only after issuance of the Board's decision, and that in turn constitutes "new evidence" and a "changed circumstance" warranting reopening. That is simply inconsistent with the prior pleadings of both FDOT and BRS, all of which recited the parties' ongoing disagreement (and, in BRS's case, displeasure) over the handling of signal construction work. A non-existent representation regarding such work could not and did not form a basis for the Board's decision.

BRS would argue otherwise based on this sentence in the Board's decision: "We will not reconsider State of Maine in whole or in part as a matter of public policy where, as here, FDOT has adequately addressed BRS' concerns regarding the employment of RLA unions for

maintenance and construction work on the Orlando Line traditionally performed by signalmen." STB Decision at 6. Yet nothing in that sentence is inconsistent with the clear and extensive record before the Board. BRS indeed had "concerns" about "maintenance and construction work on the Orlando Line traditionally performed by signalmen," and FDOT responded by agreeing that the existing signal work already performed by CSXT signal maintainers would only be bid out to contractors that would be subject to federal railroad laws.¹ That was a reasonable accommodation, and helped the Board accurately find that "this transaction will have no material adverse effect on employees of either CSXT or FDOT." STB Decision at 10.

We do not read the Board's decision to require the applicant in every Maine DOT case to offer the kind of protection that FDOT provided to BRS with respect to signal maintenance work on the Orlando Line. Instead, the Board's primary concern was that the Maine DOT transaction structure not "be used for the primary purpose of circumventing the railway labor laws." STB Decision at 10. Here, FDOT's commitment that signal maintenance work on the Orlando Line already performed by BRS-represented signalmen would continue to be conducted under federal railroad laws was simply a factor demonstrating that the transaction was not a sham undertaken to disadvantage rail labor.²

That SunRail-related signal construction work on the Orlando Line would be treated differently than signal maintenance work is neither surprising nor troubling. Such one-time upgrading work would not be undertaken *but for* the SunRail project, and in no way

¹ Thus, FDOT's December 8, 2009 letter begins by stating that FDOT is "writing pursuant to your request that the Department address the concerns of the eight (8) signalmen who work in the SunRail corridor." It concludes by noting that the proposal "should afford the signalmen the federal protections they seek in the SunRail corridor."

² As the Board also found, there were legitimate operational and service reasons for maintenance and dispatching on the Orlando Line to be the responsibility of FDOT rather than CSXT. STB Decision at 10.

represents an assumption of ongoing signal maintenance work that BRS-represented employees are already doing on the Orlando Line -- and would continue doing in the absence of SunRail. BRS presumably welcomes the opportunity to pursue its representational interests with respect to the new construction and upgrading work. What is relevant here, however, is that FDOT voluntarily agreed to protect the "rail carrier" status of ongoing signal maintenance work, and thus to mitigate perceived harm to the current CSXT signal workers.³ The Board was more than justified in finding that such arrangements "adequately addressed" the concerns that BRS had raised.⁴ And surely BRS cannot contend that the entire structure of the Orlando Line transaction was motivated solely or primarily by what labor regime would govern signal upgrading and construction activity -- a relatively small, one-time component of the overall SunRail commuter rail service project.

To prevail on its petition to reopen, BRS must show new evidence or substantially changed circumstances. BRS Petition at 1, 5; 49 C.F.R. § 1115.4.⁵ BRS's displeasure with FDOT's handling of signal construction work on the Orlando Line is neither. BRS plainly understood FDOT's position during the pleadings phase of this matter, and prominently aired its

³ BRS notes that, after the SunRail-related upgrades to the Orlando Line, there may be more signalmen conducting ongoing signal maintenance work than the eight CSXT signalmen currently employed on the line. All of those signal maintenance workers will be subject to the commitment in FDOT's December 8, 2009 letter.

⁴ FDOT's commitment regarding signal maintenance work was just the latest in a series of efforts by FDOT and CSXT to accommodate the interests of rail labor. CSXT initially offered New York Dock-type protections to all of its potentially affected employees on the Orlando Line, and later offered BRS workers "flow-back" rights, which would have allowed those employees to return to CSXT with their former level of seniority within 12 months of accepting employment with FDOT's contract operator. FDOT May 17, 2010 Reply at 19. BRS rejected both offers.

⁵ Petitions to reopen also may be based on claims of material error. 49 C.F.R. § 1115.4. BRS's petition makes no assertion of material error.

concerns before the Board. FDOT has not taken a "new position regarding the signal construction work at odds with its representations to the Board," BRS Petition at 1, and there is no reason or basis for revisiting this matter.

WHEREFORE, FDOT respectfully requests that the Board deny BRS's petition to reopen.

Respectfully submitted,

By: 

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(312) 252-1500

**ATTORNEYS FOR FLORIDA
DEPARTMENT OF TRANSPORTATION**

Dated: January 24, 2011



Florida Department of Transportation

**CHARLIE CRIST
GOVERNOR**

605 Suwannee Street
Tallahassee, FL 32399-0450

**STEPHANIE C. KOPELOUSOS
SECRETARY**

December 8, 2009

The Honorable Jeff Atwater
President, The Florida Senate
404 S. Monroe Street, Room 409 (Capitol)
Tallahassee, FL 32399-1100

Dear Mr. President:

I am writing pursuant to your request that the Department address the concerns of the eight (8) signalmen who work in the SunRail corridor. As requested, we have reached out to our contractor and discussed removing signal services from the scope of the contract so that the Department can separately procure the signal work and require that the bidders be rail employers under the Federal Railroad Retirement Tax Act. Our contractor is agreeable to the amendment in scope. Therefore, the Department commits to you that it will (1) eliminate the signal work from the scope of its current contract, (2) separately procure the signal work, and (3) require that the bidders for the signal work be "rail employers" under the Federal Railroad Retirement Tax Act. This should afford the signalmen the federal protections they seek in the SunRail corridor.

Sincerely,

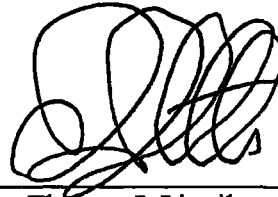
Stephanie C. Kopelousos
Secretary

cc: The Honorable Larry Cretul, Speaker of the Florida House
The Honorable Al Lawson, Senate Democratic Leader

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of January, 2011, a copy of the foregoing
**Reply of Florida Department of Transportation to Petition to Reopen of Brotherhood of
Railroad Signalmen** was served by electronic mail and overnight delivery upon:

Richard S. Edelman, Esq.
O'Donnell, Schwartz & Anderson, P.C.
1300 L Street, N.W.
Suite 1200
Washington, DC 20005

A handwritten signature in black ink, appearing to read 'T. Litwiler', is written over a horizontal line.

Thomas J. Litwiler